TABLE OF CONTENTS

Page

I. Statement of the Case and the Proceedings Below 2

B. The Question Presented 4

II. Argument 5

The Decision of the Circuit Court of the City of Richmond Rested on a Non-Federal Ground. Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case 5

III. Conclusion 10

TABLE OF CITATIONS

Cases

Allen Engineering Co. v. Kays, 106 Ark. 174, 152 S. W. 992 7

Board of Public Works v. Gannt, 76 Va. 455 6

Broad R. P. Co. v. South Carolina, 281 U. S. 537 6

Cannon v. Montgomery, 184 Ga. 588, 192 S. E. 206 7

Commonwealth v. Chilton Malting Company, 154 Va. 28, 152 S. E. 373 6

Copperweld Steel Co. v. Industrial Commission, 324 U. S. 780 5

Drucker v. Salomon, 21 Wis. 628, 94 A. M. Dec. 571 8

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157 6

Ford Motor Co. v. Department of Treasury, 323 U. S. 459 7

Fox River Paper Co. v. Railroad Commission, 274 U. S. 651 6

Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 7

Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 8

Hedgebeth v. North Carolina, 334 U. S. 806 5

Heiser v. Severy, 117 Mont. 105, 158 P. 501 7

Howat v. Kansas, 258 U. S. 181 5

Page

In Re Ayers, 123 U. S. 443 7
Looney v. Stryker, 31 N. M. 557, 249 P. 112 7
Lowenstein v. Evans, 69 Fed. 908 (C. C. 1895) 7
McCoy v. Shaw, 277 U. S. 302 5
Moyer v. Peabody, 212 U. S. 78 8-9
Parsons v. Slaughter, 63 Fed. 876 (C. C. 1894) 7
Sayers v. Bullar, 180 Va. 222, 22 S. E. 2d 9 6
Sperry-Hutchinson Co. v. Kuhn, 212 Fed. 555 (D. C. 1912) 7
Stembridge v. Georgia, 343 U. S. 541 5
Tyler v. Dane County, 289 Fed. 843 (D. C. 1923) 7
Union Trust Co. v. Stearns, 119 Fed. 790 (C. C. 1903) 7
Wilson v. State Highway Commissioner, 174 Va. 82, 4 S. E. 2d 746 6

Statutes

Code of Virginia, Chapter 17, Title 56 2
Code of Virginia, Section 56-509 7
Code of Virginia, Section 56-527 7

IN THE

Supreme Court of the United States

October Term, 1954

No. 341

WALTER LEE HALL,

Petitioner

v.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA; H. LESTER HOOKER, CHAIRMAN, AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION; WILLIAM C. SEIBERT, CHARLES H. RYBURN, JR., AND T. H. FLETCHER, JR.,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia at Richmond and/or to the Circuit Court of the City of Richmond

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions present by this petition, file this brief in opposition to the petitioner's petition for writ of certiorari. The respondents include herein their opposition to the petition on writ of certiorari on the ground that the decision below was not rested on a

federal question. The matters here relied upon are more particularly stated below.

I.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

On February 7, 1953, petitioner filed his notice of motion for judgment in the instant case in the Clerk's Office of the Circuit Court of the City of Richmond. This notice of motion for judgment alleged that the petitioner had suffered damages in the amount of Fifteen Hundred Dollars ($1,500) because of loss of earnings, inconvenience, hardship and anxiety resulting from the respondents' actions in refusing to allow him to return to work for the Washington, Virginia and Maryland Coach Company, Incorporated, on January 19, 1953.

This action was instituted in the Circuit Court of the City of Richmond as a direct result of the respondents' seizing the Washington, Virginia and Maryland Coach Company, Incorporated, on December 11, 1952, under the authority of the Public Utilities Act, Chapter 696, Acts of Assembly 1952 (Chapter 17, Title 56, Code of Virginia). This suit against the respondents for pecuniary damages was instituted after the Circuit Court of the City of Richmond denied the petitioner's and others' bill for a temporary injunction in the case styled H. J. Harris, et als v. John S. Battle, Governor of the Commonwealth of Virginia, et al, Case No. 111, October Term 1954, Supreme Court of the United States. In the companion case of Harris v. Battle a temporary and later permanent injunction was sought against the respondents to enjoin them from enforcing Chapter 696 of the Acts of Assembly 1952 on the grounds that that Act conflicted with the Labor Management Relations Act of 1947 and that it was repugnant to the Consti-

tution of the United States. In the instant case of Hall v. Battle the respondents filed a demurrer in the Circuit Court of the City of Richmond. On May 12, 1953, the Circuit Court heard argument on respondents' demurrer in the instant case and on May 13, 1953, that Court sustained the respondents' demurrer on grounds (1) that there was a misjoinder of causes of actions and (2) that in effect the suit was against the State. The Court declined to rule on the sufficiency of ground (3) that admitting the petitioner's allegations the respondents had not acted outside the scope of their authority. On October 7, 1953, the Court granted a motion of the petitioner to sever his cause from that of the other eight plaintiffs and to have the Court rule upon the individual sufficiency on grounds 2 and 3 of the demurrer. That same day the Circuit Court of the City of Richmond entered an order sustaining the demurrer on grounds (2), while this suit is in form against the officers and agents of the State, it is in effect against the State, and the State cannot be sued except by its permission, and the State has not given its permission to the plaintiffs to be sued in this case, and (3), the defendants have followed exactly and precisely the procedures and lines as set out in Chapter 696 of the Acts of Assembly of 1952 and in no way have they denied to the plaintiffs any of their rights by violating Chapter 696 of the Acts of Assembly of 1952 or any part or section thereof. Each of these grounds was found by the Court to be separately sufficient and wherefore the Court dimissed the petitioner's motion for judgment.

On June 12, 1953, the Circuit Court of the City of Richmond had entered its decree denying permanent injunction and declaring Chapter 696 of the Acts of Assembly of 1952 to be valid in all respects. The Supreme Court of Appeals of Virginia denied the petition for a writ of error and refused

to grant an appeal of the injunction case on the ground that it was a moot question.

On the 16th day of June, 1954, the Supreme Court of Appeals of Virginia reviewed the petition of the petitioner in the instant case for a writ of error and affirmed the judgment of the Circuit Court of the City of Richmond as being plainly right. The Court thus upheld the Court's action sustaining the respondents' demurrer that this is essentially a suit against the State and that the respondents had not acted outside of the scope of authority given them by Chapter 696 of the Acts of Assembly of 1952. Neither the Circuit Court of the City of Richmond nor the Supreme Court of Appeals of Virginia considered the instant case on its merits as to whether Chapter 696 of the Acts of Assembly of 1952 is unconstitutional. The two State courts below based their decision on the theory that this is a suit against the State and is not maintainable regardless of whether Chapter 696 of the Acts of Assembly of 1952 is at some time subsequent to the acts of respondents declared to be unconstitutional.

B.

The Question Presented

The sole question before this Honorable Court at the present time is: Does the Supreme Court of the United States have jurisdiction to review the decisions of the Circuit Court of the City of Richmond and the Supreme Court of Appeals of Virginia since such decisions rested on a non-Federal ground?

II.

ARGUMENT

The Decision of the Circuit Court of the City of Richmond Rested on a Non-Federal Ground, Therefore This Honorable Court Does Not Have Jurisdiction to Hear This Case.

This Court will not review decisions of State courts when their decisions rest on non-Federal grounds. *Hedgebeth* v. *North Carolina,* 334 U. S. 806; *McCoy* v. *Shaw,* 277 U. S. 302; and *Howat* v. *Kansas,* 258 U. S. 181. Furthermore, this Court has repeatedly held that it is without jurisdiction to review a judgment of a State court unless it clearly appears that the decision turned on a Federal question. *Stembridge* v. *Georgia,* 343 U. S. 541, and *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780.

The order of the Court below does not clearly indicate that the decision rested on a Federal ground. To the contrary, the order below clearly indicates on its face that the decision rested on a non-Federal ground. It recites that petitioner's motion for judgment was dismissed because it was not sufficient in law and that the respondents' demurrer was sustained on the grounds that this was, in reality, a suit against the State, and the State had not given its consent to be sued. (The other ground, that the respondents had not acted outside the scope of their authority is conceded by the petitioner to be a non-Federal decision and is not in question here.)

However, the appellants allege that the order of the Court below disposing of the case on the non-Federal ground of being a suit against the State is so untenable and unfounded that it is arbitrary and a mere devise to prevent a review by this Court. They thus urge that this Court has jurisdiction and should review the decision of the Court below. It is true that if a State court decision on a non-Federal ground is plainly unfounded this Court may review such a decision.

Likewise, it is true that if the non-Federal ground of decision has fair support, this Court will not inquire whether the rule applied by the State court is right or wrong, or substitute its own views of what is the better rule. *Broad R. P. Co.* v. *South Carolina,* 281 U. S. 537; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651; and *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.,* 243 U. S. 157.

The Supreme Court of Appeals of Virginia has previously held suits of this nature to be a suit against the State and dismissed the same. *Sayers* v. *Bullar,* 180 Va. 222, 22 S. E. 2d 9. See also, *Wilson* v. *State Highway Commissioner,* 174 Va. 82, 4 S. E. 2d 746; *Commonwealth* v. *Chilton Malting Company,* 154 Va. 28, 152 S. E. 373; *Board of Public Works* v. *Gannt,* 76 Va. 455.

In *Sayers* v. *Bullar, supra,* the Court said:

> "There is no statute which gives a right to anyone to sue the State for tort. * * *
>
> "This Court has never been called upon before to pass judgment upon a case where employees of the State are sued for tort arising from work being done by them for the State. Such is the case at bar.
>
> "It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity, for acts done by them at the express direction of the State, unless they depart from that direction.
>
> * * *
>
> "Our conclusion is that immunity of the State from actions for torts extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suf-

fered injury by their negligence." (180 Va. 225, 229, 230.)

It is unquestionable that the Governor and the other respondents in this suit were acting by and for the Commonwealth of Virginia persuant to the Public Utilities Act, Chapter 696 of the Acts of Assembly of 1952 (§§56-509—56-527 of the Code of Virginia), and that the respondents in no way stood to derive any personal benefits from their actions. The Circuit Court of the City of Richmond and the Supreme Court of Appeals of Virginia in upholding Ground No. 3 of the respondents' demurrer have expressly held that the respondents at no time exceeded the authority granted them by Chapter 696 of the Acts of Assembly of 1952.

There are several decisions of Federal and State courts which have held suits of this nature to be a suit against the State or Federal Government. *In Re Ayers,* 123 U. S., 443; *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459; *Lowenstein* v. *Evans,* 69 Fed. 908 (C. C. 1895); *Union Trust Co.* v. *Stearns,* 119 Fed. 790 (C. C. 1903); *Sperry-Hutchinson Co.* v. *Kuhn,* 212 Fed. 555 (D. C. 1912); *Tyler* v. *Dane County,* 289 Fed. 843 (D. C. 1923); *Parsons* v. *Slaughter,* 63 Fed. 876 (C. C. 1894); *Hampton* v. *State Board of Education,* 90 Fla. 88, 105 So. 323; *Heiser* v. *Severy,* 117 Mont. 105, 158 P. 501; *Looney* v. *Stryker,* 31 N. M. 557, 249 P. 112; *Allen Engineering Co.* v. *Kays,* 106 Ark. 174, 152 S. W. 992; *Cannon* v. *Montgomery,* 184 Ga. 588, 192 S. E. 206.

There are decisions from the courts of other States which clearly support the doctrine that so long as the Governor acts in good faith, believing the act of which complaint is made to be necessary to the enforcement of the law, he is not personally liable to one injured by such act, although

sufficient reason for his act did not exist. This doctrine is based upon the familiar doctrine of non-liability of a judicial officer, the office of Governor in fact requiring the exercise of discretion being considered analogous to that of a judge. *Moyer* v. *Peabody,* 212 U. S. 78; *Drucker* v. *Salomon,* 21 Wis. 628, 94 A. M. Dec. 571; *Hatfield* v. *Graham,* 73 W. Va. 759, 81 S. E. 533.

The petitioner lists several authorities to support his contention that a suit against an officer of a State for enforcing an alleged unconstitutional statute is not a suit against the State. None of the authorities cited by the petitioner appear to involve facts similar to this case. The great majority of the authorities supporting the petitioner's position involve injunction suits directed against an officer of a State seeking to enjoin him from enforcing or acting under an alleged unconstitutional statute. Such is the companion case to the instant one. In the case of H. J. Harris, et als v. John S. Battle, Governor of Virginia, et als, No. 111, October Term, 1954, which is pending in this Honorable Court, the petitioner in the instant suit and others, are seeking to enjoin the respondents in the instant suit from enforcing Chapter 696 of the Acts of Assembly of 1952 on the ground that the Act is unconstitutional. The respondents did not, in that matter, ever take the position that the suit was one against the State and therefore should be dismissed. The other type of cases supporting the petitioner's position are actions in replevin to recover specific property taken by a State officer under an alleged unconstitutional statute. The authorities on this point are divided, some holding this to be suit against the State and others holding this not to be a suit against the State. The instant case is solely for pecuniary damages in tort for enforcing an allegedly unconstitutional State statute. It differs in this respect with the authorities cited by the petitioner.

If the contentions of the petitioner in the instant case were sustained, then before the Governor or any other officer of the State of Virginia or any other State, or even the President of the United States, could enforce a law which had been duly enacted by the State Legislature, or Congress, without fear of personally being held liable for civil damages, he would have to have the constitutionality of every act of the Legislature ruled on by the Courts. It can readily be seen that this would place an impossible burden on both the executive and judicial branches of our government.

The Governor of Virginia is placed under a mandatory duty by the Public Utilities Act to take immediate possession of the utility for operation by the Commonwealth if there is a suspension or curtailment of operation of the utility to such an extent that it will, in his judgment, constitute a serious menace or threat to the public health, safety or welfare. (§2 of Chapter 696; §56-510 of the Code of Virginia) If such a suspension in the operation of a utility occurred and the Governor did not perform his mandatory duties, not only would he be guilty of a breach of the public trust but he would also be subject to impeachment proceedings. The other respondents were State officers under the authority of the Governor and they were acting solely under the direction of the Governor.

In *Moyer* v. *Peabody, supra,* this Honorable Court dismissed a suit against the Governor and certain officers of the National Guard of the State of Colorado. This Court held:

> "So long as such arrests are made in good faith and in the honest belief that they are needed in order to heed the insurrections, the Governor is the final judge and cannot be subjected to an action after he is out of office, on the grounds that he had not reasonable grounds for his beliefs." (212 U. S. 84)

This holding by the Supreme Court of the United States in sustaining a demurer states the respondents' position in the instant case. They seized and operated the public utility in good faith under the Public Utilities Act. They denied the petitioner employment on January 19, 1954, in good faith under the Public Utilities Act. Therefore, they take the position that this action for damages for their performing their mandatory duties in good faith should be dismissed. The respondents respectfully submit that an action in tort, or an action for pecuniary damages against State officers who are performing their mandatory duties, and where they are not acting outside of the scope of the authority and duty imposed upon them by the State Legislature, is a suit against the State. Therefore, the respondents pray that this Honorable Court will dismiss the petition of the petitioner on the ground that the decision of the State Court below was on a non-Federal ground.

III.

CONCLUSION

Wherefore, the respondents respectfully submit that for the reasons stated, this Court does not have jurisdiction to review the decisions of the State Courts below since their decisions rest solely upon a non-Federal ground, and the respondents respectfully move the Court to dismiss the petitioner's petition for writ of certiorari.

Respectfully submitted,

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Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

October 11, 1954

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DEC 2 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 341

WALTER LEE HALL,

Petitioner,

vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, ET AL.,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

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IN THE

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Walter Lee Hall prays that this Court grant rehearing of its order of November 8, 1954, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia in the above-entitled case as prayed for in the petition filed September 13, 1954.

Reasons for Granting Rehearing and Issuing the Writ

IN VIEW OF WHAT HAS OCCURRED SINCE THIS PETITION FOR A WRIT OF CERTIORARI WAS FILED IT IS NOW CLEAR THAT IF SAID PETITION IS DENIED THERE IS NO WAY IN WHICH THE CONSTITUTIONALITY OF THE VIRGINIA PUBLIC UTILITIES SEIZURE LAW CAN EVER BE REVIEWED.

This suit was filed by petitioner to recover damages suffered as a result of the enforcement by respondents of the Virginia public utilities seizure law (Code of Virginia, Title 56, Ch. 17, Sec. 56-509 to 56-527). The principal ground relied upon was that the statute in question is unconstitutional in that it is in conflict with the Labor Management Relations Act, 1947.

The courts below dismissed the action on the ground that it constituted a suit against the state, a ground which petitioner has argued in its petition for a writ of certiorari filed with this Court is without fair support and raised solely as a device to prevent consideration of the important federal question involved.

When the petition for a writ of certiorari was filed in this Court on September 13, 1954, there was still pending in this Court an appeal in *Harris et al vs. Stanley, et al.*, Case No. 111. That case involved a suit, instituted by the officers of the labor organization of which petitioner herein is a member, likewise alleging that the Virginia public utilities seizure law is unconstitutional, and, on the basis thereof, seeking a declaratory judgment to that effect and an injunction against any future application of said law. The Circuit Court of the City of Richmond held that the statute in question is valid and constitutional; the Supreme Court of Appeals of Virginia refused an appeal on the ground that the cause had become moot; and an appeal was taken to this Court.

Petitioner had expected that this Court would regard the mootness contention in the appeal in Case No. 111, like the "suit against the state" contention in the instant case, as untenable, and would refuse to allow that contention to stand as a barrier to review of the important federal questions involved. However, on October 14, 1954, prior to the denial of the petition for certiorari in the instant case, this Court denied the appeal in Case No. 111, and on November 22, 1954, denied a Petition for Rehearing in that case.

As a result of the denial of the appeal in Case No. 111 and the denial of the petition for a writ of certiorari in the present case, petitioner now finds that **the only two avenues by which the constitutionality of the Virginia public utilities seizure law could practicably be tested have been closed by procedural devices which have no support in law or reason.** The Commonwealth of Virginia is now free in any future labor dispute to enforce against petitioner and the thousands of other public utility employees of that state a law, **the constitutionality of which has never been passed upon by any appellate court.** And, though that law is invalid on its face, Virginia may properly infer from what has happened in this case and in Case No. 111 that, short of a criminal proceeding under those sections of the law which impose criminal sanctions, there is no way in which the constitutionality of that law can be attacked. The following, in brief, are the lessons that must be drawn from these two cases, if the denial of certiorari here sought to be reheard is allowed to stand:

1. If a suit is brought to obtain a declaratory judgment that the Virginia seizure law is unconstitutional and to enjoin its enforcement such suit will be declared moot at any time that a particular seizure that has been instituted is lifted, even though (as was done in Case No. 111) the pleadings allege that the statute constitutes a continuous interference with the right to strike and to bargain collectively guaranteed by federal law, and the plaintiff prays for permanent future relief. That means that this technique of raising the federal questions and obtaining a decision by this Court upon the constitutionality of the seizure law must be ruled out, for it is available only if the labor dispute between the employer and labor union which gives rise to the seizure and requires continuation of the seizure is kept alive, current and unsettled for the more than two years it takes to reach this Court in an injunction action.

2. If suit is brought to recover damages resulting from the enforcement of the seizure law the cause will be dismissed as a suit against the state instituted without the state's consent, even though (as was true in the instant case) the action is grounded on the contention that the law under which the defendant state officials acted is unconstitutional. Petitioner recognizes, of course, that the denial of the petition for a writ of certiorari in the instant case should not be construed as an affirmance by this Court of the lower court's holding—in contravention of all existing precedent—that the suit involved herein is a suit against the state. But it must reasonably be assumed that the courts of Virginia will now follow the precedent they have established in this case and will dismiss, on the grounds which this Court has now refused to review, any suit for damages, even though it brings into issue the constitutionality of the seizure law.

3. Nor is there any possibility of avoiding the principle which now bars a damage suit to test the validity of the Virginia seizure law in the Virginia courts by bringing suit in a federal court. In *International Longshoremen's Association* v. *Battle*, 101 F. Supp. 651, the United States District Court for the Eastern District of Virginia dismissed a suit brought in that court to test the validity of an earlier version of the Virginia public utilities seizure law, on the ground that the suit should have been brought in the Virginia state courts. That court said—in words that surely warrant reexamination now—"Plaintiffs have an altogether adequate remedy in the State courts." This Court affirmed that decision in 342 U. S. 880.

4. What would remain as the only means of obtaining review of the constitutionality of the Virginia seizure law if the denial of the petition for a writ of certiorari in the instant case is permitted to stand is to subject some employee of a public utility or officer of a labor organization

covered by the law to the sanctions imposed for a violation of the criminal provisions of the seizure statute and to raise the constitutionality of the law in an action attacking his arrest and punishment. But it need hardly be said that to require that men subject themselves to criminal prosecution and punishment in order to obtain a determination by this Court of the constitutionality of a state law which jeopardizes their employment is too unjust and too much against public policy to contemplate.

It is altogether possible and understandable that with its crowded docket this Court did not perceive the relationship between the instant petition for certiorari and the appeal in Case No. 111, and that this Court did not perceive that having denied the appeal in that case subsequent to the filing of the petition in this one it was, by denying the petition in this case, foreclosing any reasonable way in which the validity of the Virginia public utility seizure law could ever be brought to this Court for review. The effect of that law is felt every time any of the collective bargaining representatives of the public utility employees in Virginia engage in collective bargaining, whether it be in the negotiation of a new agreement or the day-to-day administration of an existing contract. The validity of that law has never been passed upon by any appellate court. To deny the employees involved every reasonable means of obtaining review of the constitutionality of that law is an injustice that this Court should not countenance.

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Appeals of Virginia and/or to the Circuit Court of the City of Richmond.

Respectfully submitted,

BERNARD CUSHMAN,
Counsel for Petitioner.

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58 of the rules of this Court.

BERNARD CUSHMAN,
Counsel for Petitioner.